Phargo, LLC d/b/a Buffalo Weaving and Belting *and* United Steelworkers of America, AFL–CIO. Cases 3–CA–24104 and 3–CA–24177

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The General Counsel seeks a default judgment[1] in this case on the ground that the Respondent has failed to file an answer to the complaint. Based on charges filed by the Union on February 20 and April 2, 2003, the General Counsel issued the complaint on May 30, 2003, against Phargo, LLC d/b/a Buffalo Weaving and Belting, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On August 1, 2003, the General Counsel filed a Motion for Summary Judgment with the Board. On August 7, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed by June 13, 2003, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated July 16, 2003, notified the Respondent that unless an answer was received by July 23, 2003, a Motion for Default Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a Motion for Default Judgment.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business at 260 Chandler Street, Buffalo, New York (the Buffalo facility), has been engaged in the manufacture of arrestor tapes. During the calendar year ending December 31, 2002, the Respondent, in conducting its business operations described above, sold and shipped from its Buffalo, New York facility goods valued in excess of $50,000 directly to points outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that United Steelworkers of America, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit), constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> The unit described in Article 6, Section 6.1.1, Attachment A, of the most recent collective-bargaining agreement between Respondent and the Union effective October 17, 2001, through October 16, 2005.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and, at all material times, the Union has been recognized as the representative of the unit by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from October 17, 2001, through October 16, 2005, and is herein called the Agreement.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative.

On about November 30, 2002, the Respondent failed to continue in effect all the terms and conditions of the Agreement by failing to remit payment of the premiums for unit employees' health insurance benefits.

The Respondent engaged in the conduct described above without the Union's consent.

On about January 15, 2003, the Respondent closed its Buffalo facility, without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the effects of this conduct.

In or about February 2003, the Respondent unilaterally subcontracted bargaining unit work, without prior notice

to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally failing to make contractually required health insurance payments since about November 30, 2002, we shall order the Respondent to restore the unit employees' health insurance coverage and reimburse the employees for any expenses ensuing from the Respondent's failure to make required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, to remedy the Respondent's failure to bargain over the effects of its decision to close its Buffalo facility, including the subcontracting of unit work, we shall order the Respondent to bargain with the Union, on request, about these subjects.[2] Because of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our Order with a limited backpay requirement designed to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968),[3] as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union about the effects on unit employees of its decision to close its Buffalo facility, including the subcontracting of unit work; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date of the closure of the Buffalo facility to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

[2] We are providing a *Transmarine* "effects" remedy for the Respondent's unlawful failure to bargain over the subcontracting of unit work, because the given facts indicate that the Respondent's subcontracting decision was the direct result of its decision to close its Buffalo facility. See *Bridon Cordage, Inc.*, 329 NLRB 258, 259 fn. 11 (1999). Although the General Counsel has not alleged that the decision to close was itself a bargainable subject, he has alleged that the failure to bargain over its effects was unlawful. The subcontracting hence was a bargainable effect of the closing. This more limited remedy is distinguishable from cases where subcontracting decisions are separate and independent employer decisions and are not the direct result of an earlier nonbargainable decision. In such cases involving separate and independent subcontracting decisions, a full backpay and reinstatement remedy is ordered, as well as restoration of the subcontracted operations, unless it is shown that restoration would be unduly burdensome. See, e.g., *Automatic Sprinkler Corporation of America*, 319 NLRB 401 (1995), enf. denied on other grounds 120 F.3d 612 (6th Cir. 1997), cert. denied 523 U.S. 1106 (1998); *Century Air Freight, Inc.*, 284 NLRB 730 (1987); *Westchester Lace, Inc.*, 326 NLRB 1227 (1998).

[3] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). As the complaint and motion do not specify the actual impact on the employees, if any, of the closure of Respondent's Buffalo facility and the subcontracting of unit work, we shall permit the Respondent to contest the appropriateness of a *Transmarine* backpay remedy at the compliance stage. See *Z&Z Distributing Company*, 320 NLRB 1031, 1033 fn. 2 (1996).

Backpay shall be based on earnings which the employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, in view of the fact that the Respondent's Buffalo facility is closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the unit employees that were employed by the Respondent at any time since November 30, 2002, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Phargo, LLC d/b/a Buffalo Weaving and Belting, Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with United Steelworkers of America, AFL–CIO, as the collective-bargaining representative of the employees in the following appropriate unit by failing to continue in effect all the terms and conditions of the October 17, 2001, to October 16, 2005, collective-bargaining agreement by failing to remit payment of the premiums for unit employees' health insurance benefits. The unit is:

> The unit described in Article 6, Section 6.1.1, Attachment A, of the most recent collective-bargaining agreement between Respondent and the Union effective October 17, 2001, through October 16, 2005.

(b) Subcontracting bargaining unit work, without prior notice to the Union, and without affording it an opportunity to bargain over the subcontracting and its effects as a direct result of the Respondent's decision to close the Buffalo facility.

(c) Closing the Buffalo facility without prior notice to the Union, and without affording it an opportunity to bargain over the effects of the closing on unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the unit employees' health insurance coverage and reimburse the employees for any expenses ensuing from the Respondent's unilateral failure to make contractually required health insurance payments since about November 30, 2002, with interest, as set forth in the remedy section of this decision.

(b) On request, bargain with the Union over the subcontracting of unit work, and its effects as a direct result of the Respondent's decision to close its Buffalo facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(c) On request, bargain with the Union over the effects of the Respondent's decision to close the Buffalo facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(d) Pay to the unit employees their normal wages for the period set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[4] to all unit employees who were employed by the Respondent at any time since November 30, 2002.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2003

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with United Steelworkers of America, AFL–CIO, as the collective-bargaining representative of the employees in the following appropriate unit by failing to continue in effect all the terms and conditions of the October 17, 2001, to October 16, 2005, collective-bargaining agreement by failing to remit payment of the premiums for unit employees' health insurance benefits. The unit is:

> The unit described in Article 6, Section 6.1.1, Attachment A, of the most recent collective-bargaining agreement between Respondent and the Union effective October 17, 2001, through October 16, 2005.

WE WILL NOT subcontract bargaining unit work, without prior notice to the Union, and without affording it an opportunity to bargain over the subcontracting and its effects as a direct result of our decision to close the Buffalo facility.

WE WILL NOT close the Buffalo facility without prior notice to the Union, and without affording it an opportunity to bargain over the effects of the closing on unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the unit employees' health insurance coverage and reimburse the employees for any expenses ensuing from our unilateral failure to make contractually required health insurance payments since about November 30, 2002, with interest.

WE WILL, on request, bargain with the Union over the subcontracting of unit work, and its effects as a direct result of our decision to close the Buffalo facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL, on request, bargain with the Union over the effects of our decision to close the Buffalo facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay unit employees their normal wages when last in our employ from 5 days after the date of this decision until occurrence of the earliest of the following conditions: (1) we bargain to agreement with the Union about the effects on unit employees of our decision to close the Buffalo facility, including the subcontracting of unit work; (2) a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of this decision, or to commence negotiations within 5 business days after receipt of notice of our desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount that he or she would have earned as wages from the date of the closure of the Buffalo facility to the time he or she secured equivalent employment elsewhere, or the date on which we shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in our employ, with interest.

PHARGO, LLC D/B/A BUFFALO WEAVING AND BELTING